No. 92-94

In the

Supreme Court of the United States

October Term, 1992

Larry Zobrest, Sandra Zobrest, James Zobrest,
by Larry and Sandra Zobrest, his parents,
Petitioners,

v.

Catalina Foothills School District,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Respondent.

ARGUMENT

I. Introduction

Legal scholars, including members of this Court, are not of one mind as to the preferred mode of analysis in establishment of religion cases. However, the tripartite test in Lemon

v. Kurtzman, 403 U.S. 402 (1971), raising the question of the constitutionality of providing salary supplements and reimbursements to teachers in sectarian schools, has been followed by the Court in every so-called "parochaid" (aid to parochial schools) case since that time. Although not always easy to follow, through this line of cases runs one consistent thread in the decisions of both the majority and the dissenters: direct aid to religious activities is unconstitutional. Amicus submits that the instant case presents a clear example of such direct aid.

In establishment of religion cases other than those involving parochaid, the Court has applied a variety of tests. In Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld prayer at legislative sessions based on the historical underpinnings of that practice. The Court employed a "coercion" test in finding a school sponsored prayer at a middle school graduation unconstitutional in the case

of Lee v. Weisman, 112 S.Ct. 2649 (1992). See also County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086 (1989) (Kennedy, J. dissenting). Some members of the Court have advocated an "endorsement" standard. Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J. concurring). See also Lee v. Weisman, 112 S.Ct. at 2667 (Souter, J. concurring). But regardless of which analytical road one follows, the journey in this case will reach the same end -- a school district cannot pay a public employee to serve as a deaf interpreter during religious worship and religious instruction without unconstitutionally establishing religion.

II. The facts in this case present a more egregious case of establishment of religion than those in Lemon v. Kurtzman and other parochaid cases. The aid here has the "primary effect" of advancing religion even under the analysis in the dissents in those cases.

Amicus urges this Court to retain the test established in Lemon v. Kurtzman. Although fine lines have been drawn by the

Court in ruling on various types of aid, schools across the land have lived with those lines, in some cases for as long as 20 years, and it would be unfortunate and unsettling to send a message that the Court is reevaluating all the prior parochaid decisions. Other standards may have been easier to apply had they been adopted at the outset, but established precedents should not be overturned merely to tidy up constitutional analysis in this area. In the words of Justice Holmes, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Moreover, it is highly likely that both the majority and the dissent in the parochaid cases decided under Lemon would have reached their respective conclusions even under a different analytical scheme.

Both the majority and dissenting opinions in this Court's parochaid cases lead to the clear conclusion that the aid in this case is

unconstitutional. On one hand, the majority opinions in these cases have upheld the constitutionality of general financial assistance provided directly to students but have approved specialized aid only when it is provided off private school premises or if it is incapable of being used for religious purposes. On the other hand, the dissents have indicated that parochaid should be overturned only where the record contains evidence that the aid supports religious activities directly.

Prior to Lemon a number of cases upheld certain forms of indirect parochaid, which are distinguishable from the aid at issue here. Although the decisions have overturned funding schemes that provide unrestricted aid to religious institutions, they have upheld programs of general aid directly to students (or their parents) or specific aid to students (or their parents) that is not capable of diversion to religious purposes. Everson v.

Board of Education of Ewing, 330 U.S. 1 (1947), upheld a program to provide transportation to private school students; Board of Education v. Allen, 392 U.S. 236 (1968), upheld a program providing textbooks to private school students.

After Lemon, the Court in Mueller v. Allen, 463 U.S. 388 (1983, upheld monetary assistance directly to parents or students in the form of a tax deduction for education expenses for parents of students in elementary and secondary schools, and in Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), upheld vocational training assistance provided to a blind student studying to become a pastor. The Court in Wolman v. Walter, 433 U.S. 229 (1977), upheld non-monetary assistance (therapeutic, guidance, and remedial services) to private school students on public school grounds. The Court also upheld certain services provided on private school premises, on the grounds that

they raise no possibility of transmitting sectarian views (diagnostic speech and hearing services; diagnostic psychological services and textbooks provided to students at the request of the private school) or are incapable of diversion by the private school to religious purposes (testing and scoring program to assure that state educational standards are met).

The aid in this case does not fall into any of the categories which the Court has upheld. The important distinction here is that the assistance provided by the State is not restricted to secular activities and is not the type of generic aid that was the subject of Witters and Mueller.

Before turning to an analysis of types of aid held unconstitutional, let us examine the aid which is the subject of the instant case. The Individuals with Disabilities Education Act (IDEA, formerly called the Education for All Handicapped Children Act), 20 U.S.C. 1401

et seq., requires that students with disabilities enrolled in private schools be provided special education and "related services." 1413(a)(4)(A). Amicus agrees with the United States' argument in its brief in this case that the IDEA does not necessarily violate the Establishment Clause. Brief of United States at 11, 14, 16, 17, Zobrest v. Catalina Foothills School District, (No. 92-94) (U.S. cert. granted, Oct. 5, 1992). The statute itself does not set out the manner in which the equitable participation of private school students is to be afforded, therefore, the constitutionality of the statute itself is not at issue here. The question to be addressed here is whether, under the specific facts of this case, the Catalina School District would establish religion if it acceded to the Zobrest request and paid a public employee to translate religious worship and religious education programs at Salpointe

(the Catholic school in which the Zobrest child is enrolled.)

In Lemon v. Kurtzman the Court cited Board of Education v. Allen as the source of the first prong of its tripartite test, requiring enactments to have a secular purpose and of the second prong, proscribing enactments that have a "primary effect" of advancing or inhibiting religion. In Lemon the Court added a third prong prohibiting government "entanglement" with religion. However, the Court can decide this case without resort to this prong which has been the subject of a great deal of contention in the Court over the years. Amicus submits that the aid at issue in this case cannot past muster under the first two prongs of the Lemon precursors, the dissent in Lemon or the majority or dissenting opinions in the parochaid cases which follow Lemon.

In Allen the Court upheld a statute requiring school districts to provide

textbooks to students in private schools. The private schools, upon receiving a request from a parent, notified the school district of the textbook chosen by the private school. In upholding the statute, the Court noted that it had no evidence before it to indicate that the textbooks would be used to support religion.

> Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. [Emphasis supplied.]

392 U.S. at 247. See also Everson, 330 U.S. 1 (using the same standard in upholding a statutory requirement that school districts provide transportation to private school students).

In the instant case, however, the parties stipulated that "the two functions of secular education and advancement of religious values

or beliefs are inextricably intertwined throughout (sic) the operations of Salpointe. [Emphasis supplied.]" See Joint Appendix at 92.

This conceded "intertwining" requires invalidation of the aid at issue here even under the dissent's analysis in Lemon. Justice White's dissent faulted the majority for its refusal to trust private school teachers to uphold their pledge to teach only secular matter and, consequently, holding the statute unconstitutional because it requires a school district either to risk the unconstitutional "effect" of publicly funded private school teachers slipping religious teachings into secular courses or to "entangle" government with religion through efforts to monitor the teachers. Justice White opined that the Court should not have assumed without a record of abuse by the private school teachers.

> At trial under this complaint, evidence showing such a blend [of religious teaching with secular subjects] in a course supported by state funds would appear to be admissible and, if credited, would establish financing of religious instruction by the State.

403 U.S. at 671.

The Stipulation between the parties in this case shows such a "blend" of religious and secular teachings at Salpointe.

> 25. Teachers at Salpointe sign a Faculty Employment Agreement which states that 'Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other.

Joint Appendix at 90.

> 26. The Faculty Employment Agreement requires teachers to not only accept, but also to promote, the relationship among the religious, the academic and the extracurricular.

Joint Appendix at 91.

Justice White's dissent in Lemon further noted:

> [The lower courts do not reach] the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

403 U.S. at 670, n. 2.

The parties' Stipulation shows that the proof of which Justice White speaks in Lemon has been made in this case.

> 22. Salpointe has as its distinguishing purpose the inculcation in its students of the faith and morals of the Roman Catholic Church.
>
> 23. Religion is among the required subjects at Salpointe. All students are provided formal instruction in the Roman Catholic faith.

Joint Appendix at 90.

Stipulation 35 provides that interpreters are forbidden by their code of ethics to "edit in any way communications to and from the deaf person who he or she serves as a sign language interpreter." Joint Appendix at 93.

Petitioners and the United States argue that the accuracy of the translation takes this case out of the rubric of cases like Grand Rapids v. Ball, 473 U.S. 373 (1975), U.S. Brief at 12, Petitioner's Brief at 20. Apparently, they believe that if the interpreters translate exactly what is presented, the translation becomes less religious. If this were a situation like Lemon where funds were earmarked solely for teachers who instruct in secular courses and if the proof in this case indicated that none of the courses included religious material, Stipulation 35 might be relevant. But the parties have stipulated that the interpreters are used to interpret religious material, so an accurate translation would necessarily transmit a religious message.

The aid similarly fails constitutional muster under the analysis in the post-Lemon parochaid dissents. In PEARL v. Nyquist, 413 U.S. 756 (1973), Justice White's dissent

(Burger, C.J. and Rehnquist, J. concurring) believed that the "tax forgiveness" statute at issue should not have been held unconstitutional on its face. The dissent criticized the majority's emphasis on a particular type of parochial school, because many such schools are not restricted to students of a particular religion and do not condition attendance on religious study. 413 U.S. at 822. In the present case, however, the parties have stipulated that the school requires Catholic religious study. Joint Appendix at 90

Justice Rehnquist, in another dissenting opinion in Nyquist, (Burger, C.J. and White, J. concurring) could find no distinction between the general aid in the form of a "tax abstention" measure at issue and the aid to parents in Everson and Board of Education v. Allen. 413 U.S. at 800. The case at bar, of course, involves aid directly to religious instruction.

In Levitt v. PEARL, 413 U.S. 472 (1973), this Court held unconstitutional a statute reimbursing private schools for their teachers' time in preparing and grading tests. Justice White dissented without opinion, presumably for the same reasons announced in the dissents in Nyquist and Lemon. The majority assumed that the funding was used to support teacher-prepared tests which might have included religious material despite the absence of any facts on the record to support that conclusion. However, as noted above, in the instant case, the parties stipulated to the fact that the interpreter would be used for religious worship and instruction.

Finally, in Grand Rapids v. Ball this Court overturned both a program which funded public school teachers to instruct in religious schools and one that funded religious school teachers to teach in religious schools. In Felton v. Aguilar, 473 U.S. 402 (1985), decided the same day as Grand

Rapids, the Court overturned public funding of public school teacher instruction in private schools on the ground that the monitoring system to assure that the teachers do not inculcate religion would result in excessive "entanglement" with religion. Justice O'Connor dissented in Felton because only public school teachers were used and dissented in Grand Rapids only as to the programs that used public school teachers. Justice O'Connor noted that nothing in the record supported a conclusion that public school teachers would proselytize the students, while there was both a real and perceived "effect" of advancing religion in funding regular private school employees accustomed to integrating religion into the entire curriculum. Justice Rehnquist dissented in both cases because of the lack of evidence of religious inculcation. Justice Rehnquist pointed out that the majority did a disservice to public school teachers by assuming they would be "eager inculcators of

religious dogma." 473 U.S. at 401. He also refused to accept the "Catch 22 paradox" that in attempting to prevent teachers from advancing religion, the government would become "entangled" with religion. 473 U.S. at 419. Justice White also dissented for the reasons set forth in his dissent in Lemon. Again, in the case at bar there is ample evidence that the funds are going directly from the state to a religious activity.

Amicus engages in this somewhat lengthy analysis of dissents in this Court's parochaid decisions in order to emphasize that nothing in either the majority opinions or the dissents supports a contention that direct aid to religious activities in parochial schools could under any circumstances pass constitutional muster. The "primary effect" of the expenditure of public funds to pay a public employee to interpret religious messages for a young student is to support religion.

Petitioners and the United States argue that Grand Rapids v. Ball does not apply here because the state is funding an interpreter rather rather than a teacher and there is no "perception" of government support of religion or a "symbolic union" of church and state. Brief of Petitioners at 2, 12 and Brief of U.S. at 9. The relationship between church and state in the case at bar is even closer than that in the cases cited above. There is not merely a perception of support of religion, it is a reality. State funds are being funneled directly into religious services and religious education.

III. A hearing aid is distinguishable, in fact, from an interpreter for the deaf but either form of aid is unconstitutional if provided at public expense for use in religious worship and instruction.

The dissenting judge in the decision below and the brief of the United States argue that interpreters are no different from hearing aids. Amicus submits that there is a

significant factual distinction between a public employee acting as an interpreter for the deaf and a piece of equipment such as a hearing aid. American Sign Language is as much a language as English, French or Russian and a signer is more analogous to a foreign language translator than to a hearing aid. Anyone who has compared different translations of classical, works such as those by Aeschylus and Euripides, understands that each translation is unique without necessarily being dishonest to the intent of the author. So it is with interpreters for the deaf.

A hearing aid is static, acting merely as a mechanical sound amplifier, while a deaf interpreter translates from English to sign language. Deaf interpreters are dynamic, each having his or her own individuality of signing with the use of both hand signals and facial expressions. Different cultures have also developed their own distinctive sign languages. For an interesting discussion of

how deaf people communicate, see R. Wolkomir "American Sign Language: 'It's not mouth stuff -- it's brain stuff'," Smithsonian, Vol. 23 at 30 (July 1992).

Factual differences aside, for the purpose of the establishment clause, a deaf interpreter and a hearing aid are alike because government provision of either in a religious class is unconstitutional.[1]

In Meek v. Pittenger, 421 U.S. 349 (1975), this Court overturned a statute which funded instructional material and equipment to be used predominantly in religious schools. Petitioners cite Meek for the proposition that the Court should look at the totality of the aid to institutions under the IDEA, rather than to the specific service in question. Petitioners' Brief at 19. However, the amount

[1] Furthermore, although school districts may be required to provide interpreters in some cases, school districts are not required, under the IDEA, to provide hearing aids to special education students because they are considered to be "personal items." 211:19 EHLR (April 4, 1978).

of funding or number of recipients should not be the inquiry in a case, like the instant case, where there are facts on the record to show exactly where the assistance is going.

Justice Rehnquist and Justice White dissented in Meek on the ground that the majority's holding that the "primary effect" of the statute was to advance religion, was based on the number of religious schools funded rather on the use of the funds. The dissent found more persuasive the rationale of the district court which had upheld the statute except to the extent that it "permit[ted] the loan of instructional equipment which can be easily diverted to a religious use." 421 U.S. at 389, n. 1, citing 374 F.Supp. 639, 661 (E.D. Pa. 1974). For the same reasons, Justices White and Rehnquist also dissented in Wolman v. Walter, where the Court overturned an Ohio statute authorizing public funds to purchase instructional

materials and equipment for use of students in religious schools.

The United States in its brief compares the provision of a sign language interpreter to the provision of public health services to students in sectarian schools validated by the Court in Wolman. U.S. Brief at 20. However, it should be noted that Wolman also found unconstitutional funding of equipment that could be used for religious purposes. As noted above, even the dissent agreed that it is the use of the equipment that is relevant.

Whether or not one finds a parallel between interpreters and hearing aids, it would appear that when public funds are used to support a public employee or to pay for a piece of equipment in order to communicate religious messages -- that expenditure is unconstitutional under both the majority and dissenting analyses in Pittenger and Wolman.

IV. The direct aid to religious worship and instruction at issue here, is distinguishable from the general aid to students and parents at issue in Witters and Mueller.

The dissent below, and briefs of Petitioners and the U.S. agreed, opined that the type of "general aid" involved here has such a minimal effect on religious institutions, that it cannot be said to have a primary effect of establishing religion. The aid is problematic, however, not because of the amount of money involved or the financial benefit to the religious institution -- but because of the religious significance of the aid in support of sectarian religion. When government funds religious worship and religious instruction directly, the government establishes religion regardless of the amount of money expended or of the financial benefit to a particular religious institution.

This Court's decisions upholding grant programs directly to students or parents of students are distinguishable from this case.

Both Hunt v. McNair, 413 U.S. 734 (1973), and Tilton v. Richardson, 403 U.S. 672 (1971), involved assistance to colleges for construction of academic facilities except those which are used for sectarian instruction or religious worship. In Hunt the assistance was in the form of state revenue bonds and in Tilton the aid was through federal grants. On the contrary, there is no restriction in the IDEA as to use of funds for sectarian instruction or religious worship and, in fact, in this case it is undisputed that the service is to be provided in both sectarian instruction and religious worship.

The dissent and briefs of Petitioner and the U.S. cite Mueller v. Allen, 463 U.S. 388 (1983), in support of their contention that the aid here is constitutional because it results from private choices. Mueller involved a tax deduction for educational expenses for both private and public elementary and secondary schools. The Court

refused to engage in an "empirical inquiry" as to the relative number of public and private schools which are benefitted by the law because, on its face, it assisted all parents of school-age children. And, although the aid may ultimately have an "economic effect comparable to that of aid given directly to the schools, under Minnesota's arrangement the public funds become available only as a result of numerous private choices of individual parents." 463 U.S. at 400. In the instant case we need not engage in speculation as to the use of the assistance at issue, because the parties stipulated to the fact that the assistance goes directly from the state to a religious activity.

The U.S. cites Widmar v. Vincent, 454 U.S. 263 (1981), for the proposition that if general benefits to religion are unconstitutional, a city would be precluded from providing fire and police protection or repairing its public sidewalks. U.S. Brief at

19. That example is not apt here. In this case, secular state funds are used in the direct support of religious exercises and education programs whereas sidewalks and fire protection are peripheral to the religious mission of the school and of an entirely different character from the service at issue here.

The dissent and briefs of Petitioners and the U.S. also cite Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), in support of their conclusion that even if "a small portion of the state's funds ultimately flowed to a religious institution [that] did not undercut the laudatory secular purpose of the law." As discussed above, the dollar amount of aid or number of persons or institutions served is not relevant. The pivotal concern is the type of aid and the activity to which the aid flows.

Witters involved a vocational education financial assistance program for persons with

disabilities. The assistance was provided directly to students who were free to use it at the institution of their choice. This Court held that the fact that the funds are ultimately used to pay tuition at a religious school is the direct result of the independent choice of the student and not attributable to the State. Although the Court, citing Grand Rapids v. Ball, agreed that generally "aid to a religious institution unrestricted in its potential uses . . . [is] clearly unconstitutional," since the aid at issue in Witters went directly to the student the fact that the aid was unrestricted was not constitutionally problematic. The relationship between the state and the student was secular. Although the next transaction, between the student and the school, was not entirely secular, the government was no longer a party to the transaction. In this case there are no "middle men." The aid goes

directly from the state to a religious activity.

Petitioners suggest in their brief that it is inappropriate in Constitutional analysis to "split hairs." Petitioner's Brief at 23. What may appear to one as "splitting hairs" is to another a serious deprivation of rights. Line drawing is an essential part of First Amendment analysis. In any of the cases cited by Petitioners a slight change in facts would likely have changed the result. Had the state conditioned funding in Witters or the deduction in Mueller on attendance at religious schools, the Court would have at least examined whether the assistance was restricted to secular uses. If the assistance in Witters or Mueller had gone directly to the school for use in religious instruction and worship, the Court would probably have found that use unconstitutional. Had the general assistance to private schools in Tilton and

Hunt been unrestricted, the constitutional conclusion may have been different.

The case at bar presents neither a case of financial aid directly to a student nor a case of assistance to a private school for secular purposes. Although the service if examined out of context may be secular, the service is used by the state for pervasively sectarian purposes. Unlike Witters, a "reasonable observer is likely to draw from the facts [in this case] an inference that the State itself is endorsing a religious practice or belief." Witters, 474 U.S. at 494 (O'Connor, J. concurring).

V. The free exercise of religion clause does not require a school district to violate the law (in this case the establishment of religion clause) in order to accommodate the religious beliefs of a parent. Further, the state does not "inhibit" religion by refusing to provide assistance to sectarian worship and instruction.

Petitioners argued below that since Respondent would have provided a deaf interpreter to the child had he been enrolled

in a public school or a private non-sectarian school, his free exercise of religion rights have been infringed. Petitioners use a related argument in their brief in this Court, which arises out of the second prong of the Lemon test, that the denial of the service has a "primary effect of inhibiting religion." Brief of Petitioners at 22.

A number of this Court's parochaid decisions result in a similar "inhibition." In Meek v. Pittenger students in public and private secular school were afforded auxiliary services including counseling, testing, psychological services, speech and hearing therapy while students in religious schools were not entitled to such services. In Meek and Wolman v. Walter the students in parochial schools would have been supplied instructional equipment and materials had they been enrolled in public or private secular schools. In Grand Rapids v. Ball and Aguilar v. Felton parochial school students could not receive

supplemental educational services in their school, while public school students were afforded such services on the premises of their schools. The State is not, by its refusal to support the religious mission of the parochial schools, infringing the free exercise rights of the students in those schools nor is it "inhibiting" religion. Furthermore, public school students are entitled to interpreter services only for secular instruction -- just as private school students are. The difficulty here is that religious and secular education in Petitioner's school cannot be separated.

The only way that the Petitioners' request in this case can be accommodated is by establishing religion. It is arguable that Petitioners free exercise rights are not even "burdened," since special education services are available to the Petitioners and, in fact, are being provided by the school district in the public school. Nevertheless, the free

exercise clause does not require the State to violate State law, much less the U.S. Constitution, in order to avoid burdening an individual's free exercise rights. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

VI. Using public funds to pay public employees to assist students in sectarian worship and sectarian instruction coerces taxpayers to provide direct support to religion.

This Court in Lee v. Weisman declined to reconsider its decision in Lemon but applied a combination of a "coercion" and an "endorsement" test in finding nonsectarian prayer at middle or high school graduations unconstitutional because of the psychologically coercive nature of the practice at an event as important as graduation and because of the school endorsement of the prayers which were required to meet guidelines provided by the school principal. The dissent disagreed with the

"psycho-coercion" standard of the majority, but conceded that:

> [O]ur constitutional tradition . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in the benevolent, omnipotent Creator and Ruler of the world, are known to differ (for example, the divinity of Christ).

Petitioners argue that Weisman is not applicable here because students are not coerced. None of this Court's parochaid case raise issues of coercion of students, but they involve, nevertheless, coercion -- coercion of the taxpayer. Using taxpayer funds to subsidize sectarian worship and instruction is coercive and constitutes government endorsement of sectarian religion. The government's use of moneys collected from Jews or Muslims or even from members of other Christian religions to support Catholic worship and religious education offends establishment of religion principles. In Lee

a majority of this Court held that the government's action in indirectly coercing a student to stand silently during a short nondenominational prayer is unconstitutional. It is equally coercive to require taxpayers to support conspicuously sectarian worship and religious instruction.

In this case the government is not merely indirectly supporting a passive religious symbol such as the creche in County of Allegheny v. American Civil LIberties Union, 109 S.Ct. 3086 (1989). Here the government is engaging in the highly coercive activity of taxing to aid a particular religious belief. The government is supporting religious proselytizing and has taken "the first step down the road to an establishment of religion." 109 S.Ct. at 3139 (Kennedy, J. dissenting).

VII. Private schools serve an important role as an alternative to public education but it is not accurate to portray them as relieving public schools of a financial burden.

Amicus supports the mission of private schools, both secular and religious, to provide an alternative to parents for the education of their children. However, given the serious lack of funds available for public education, Amicus believes that public funds should not be used to support private schools. In a number of earlier parochaid cases, the argument has been urged on this Court, without support, that private schools relieve the financial burden of public schools by removing a large number of students from the public schools which the public schools would otherwise be required to educate. See, e.g., Wolman v. Walter, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (1977); Committee for Public Ed. & Religious Lib. v. Nyquist, 413 U.S. at 819 (White, J.

dissenting); Mueller v. Allen, 463 U.S. at 396. As the discussion below points out, the evidence does not support this conclusion. Similarly, there is no support for the argument that because parents of children in private school are compelled to support public school services unused by them, they should be afforded financial relief out of public funds. See, e.g., Nyquist, 413 U.S. at 813 (Rehnquist, J. dissenting in part). Taxpayers without children are also compelled to support public schools, but they are benefitted in the same way as are parents of children in private schools, because an educated populace benefits everyone.

Recently the concept of "choice" has received a great deal of publicity. President Bush, for example, included a public/private "choice" proposal in his school reform package, asking Congress for $230 million in fiscal year 1992. The Bush Administration's latest initiative, called the "G.I. Bill for

Children," proposed to give $1,000 vouchers, usable at public or private schools, to as many as a half million low-income families. Carnegie Foundation for the Advancement of Teaching, School Choice. However, "choice" is not the panacea it is touted to be.

A recent study by Carnegie Foundation for the Advancement of Teaching has found that "[s]chool choice to be successful, requires additional administrative and financial support. It is not a cheap path to educational reform." School Choice at 26.

Often the most expensive children (disabled, children from disadvantaged families with parents with less education) remain in the public schools, while wealthier, more educated parents send their children to private schools. For example, a survey of those participating in the Milwaukee "choice" program indicated that parents who sent their children to private schools were more highly educated than those who did not. Forty-five

percent of the mothers and female guardians had "some college" while only 29 percent of the nonparticipants had attended college. Id. at 17. The same Carnegie study also found that income is a relevant factor in parental choice. In Montclair, New Jersey where all parents must participate in choice, families with incomes less than $50,000 used fewer sources of information in making their decisions than higher income families. Eighty-four percent of the highest income parents made visits to schools while about half of the lower income parents made the visits. Id. at 18.

Studies also indicate that there is a direct correlation between academic achievement and parental support. Met Life, (September 15, 1992). Lack of parental support is a serious problem in some public schools, particularly in large urban areas, while parental support is almost universally high in private schools, even where parents

are in a lower socio-economic situation or have less education.

There is no evidence to support the contention that public/private "choice" plans will improve education. Milwaukee is the only jurisdiction where such a plan has been implemented, and the Carnegie Foundation has found that it is too early to determine whether the plan is effective.

> In Milwaukee, then, the battle lines have been drawn as clearly as any place in the nation between those who believe that public education cannot improve without the threat of competition, and those who believe that a voucher system would weaken public schools and dramatically reduce the prospects that such renewal ever will occur.

School Choice at 81.

Public schools, particularly those in large urban areas, must also deal with social problems to a greater extent than private schools -- gangs, discipline, weapons and drugs etc.

> In the face of these pressures, the schools have been called upon to

> take over roles formerly provided by the family, churches, and other agencies, ranging from sex education to housing and feeding children from dawn to dusk, well beyond school hours.

Robert Carr, The Wall Street Journal, May, 1991.

Public schools must comply with federal and state antidiscrimination laws while private schools are often exempt. According to the Carnegie Commission, in 1990 the U.S. Department of Education issued an opinion to the effect that private schools are not covered by the IDEA.

The Carnegie Foundation report points out that often school "choice" advocates treat the subject as one of individual "consumerism" rather than recognizing the need of upgrading education for all students. School Choice at 94. Amicus submits that it is a matter of good public policy, as well as a legal mandate, for the state to accommodate parental choice, provided the private school chosen

meets minimum state educational guidelines. But that does not mean that private choices should necessarily be funded by the public.

Amicus brings up these issues only to draw the Court's attention to the fact that this case should not be decided on a policy basis emphasizing the importance of private schools to the education of the country or the importance of the education of all children with disabilities. Amicus concedes those facts. There are also very serious and important reasons, in these times of fiscal restraint, to look to the private sector to fund private education and reserve dwindling public resources for public education.

Just as members of this Court have faulted prior decisions which make assumptions as to whether public assistance is being used to fund religious instruction, see, e.g., Meek v. Pittinger, Wolman v. Walter, Grand Rapids v. Ball, Amicus respectfully requests the Court not to make assumptions about the

relative merits of using public funds to support private secular education. That is not the issue here. The issue is whether the government in this case would establish religion were it to provide direct subsidies to religious services and instruction through the provision of an interpreter for the deaf.

CONCLUSION

Nothing in this brief should be interpreted as advocating that "our society as a whole should be a secular one." Meek v. Pittenger, 421 U.S. at 395 (Rehnquist, J. dissenting). Our society was built on a strong religious foundation, and Amicus believes young people should be exposed to religious training through their churches, temples and synagogues. But the state, qua state, should maintain religious neutrality. "[T]he line between state neutrality to religion and state support of religion is not easy to locate. 'The problem, like many problems in constitutional law, is one of

degree.'" Allen, 352 U.S. at 242. But it does not take a constitutional scholar to decide that using taxpayer money to pay for a public employee to accompany a student to Catholic religious worship and to classes which are liberally laced with Catholic dogma is support -- not just accommodation -- of sectarian religion. The argument that the provision of such a service is "incidental," demeans the importance of the religious content of the religious worship services and the religious instruction. This case presents an example of establishment of religion in a blatant form.

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson, 330 U.S. at 15.

Amicus urges this Court to affirm the decision below.

Respectfully submitted,

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